JUN 26 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1496

LOCAL 203, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

THE COLONIAL PRESS, INC. and the NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF THE COLONIAL PRESS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

Pages

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Writ 2

1. The decision below is not in conflict with that of another United States Court of Appeals. 2
2. This case is not flatly contrary to National Labor Policy in an area of great significance. 4
3. Picketing may not be construed as acceptance of an offer of employment. 5

Conclusion 6

AUTHORITIES CITED

Confectionery & Tobacco Drivers & Warehousemen's Union, Local 805 v. N. L. R. B., 312 F. 2d 108 (2d Cir. 1963) 3, 4

N. L. R. B. v. Childs Co., 195 F. 2d 617 (2d Cir. 1952) 4

N. L. R. B. v. E. A. Laboratories, 188 F. 2d 885 (2d Cir.), cert. denied, 342 U. S. 871 (1951) 3

N. L. R. B. v. Pennwoven, Inc., 194 F. 2d 521 (3d Cir. 1952) 4

N. L. R. B. v. Textile Machine Works, Inc., 214 F. 2d 929 (3d Cir. 1954) 4, 5

STATUTES CITED

	Pages
29 U. S. C. § 152 (3)	5
29 U. S. C. § 160 (e)	5

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Respondent, The Colonial Press, Inc., prays that the Court deny the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in *National Labor Relations Board, et al. v. The Colonial Press, Inc.*, on February 28, 1975.

—o—

QUESTIONS PRESENTED

1. May offers of re-employment to a lawfully discharged employee, who joins picketing during an unfair labor practice strike, be considered condonation resurrecting the employer-employee relationship and entitling the employee to reinstatement?

2. Were offers of re-employment made?

3. If offers of re-employment, requiring acceptance, were made, were they accepted by continued picketing on the part of the discharged employees?

———o———

STATEMENT OF THE CASE

Respondent will accept, for the purpose of the Petition filed herein, Petitioner's Statements of Opinions Below, Jurisdiction, Statutes Involved, and The Case.

———o———

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with that of another United States Court of Appeals.

Petitioner asserts that the Second Circuit has taken a position in direct conflict with the holding of the Eighth Circuit in this case. A reading of the cases cited by Petitioner reveals that the holdings are not inconsistent and the cases are factually dissimilar.

Both *Confectionery & Tobacco Drivers & Warehousemen's Union, Local 805 v. N.L.R.B.*, 312 F. 2d 108 (2d Cir. 1963), and *N.L.R.B. v. E.A. Laboratories*, 188 F. 2d 885 (2d Cir.), *cert denied*, 342 U. S. 871 (1951), involved in-court strike settlements, which were relied upon by the strikers and which were in essence contractual agreements. In the instant case, the Administrative Law Judge found that there were no mutual promises and no one accepted whatever offer there may have been (A. 40-41). Moreover, whatever offer there may have been was not made to all six former employees and no terms or conditions of employment were discussed.

The second significant distinction was that the discharges here were made prior to any strike, whereas in *Confectionery & Tobacco Drivers* and *E. A. Laboratories* they were made after the employees engaged in strikes. In this case, the discharges were not "tactical" discharges, and the General Counsel in investigating the reasons for the discharges failed to find that they were for other than unprotected activity. As the Administrative Law Judge, affirmed by the Eighth Circuit, concluded, "it should take more than 'condonation' or an unaccepted offer of employment to turn a dischargee into a striker and then into an unfair labor practice striker entitled to reinstatement. . . . " (A. 41; A. 7).

Another distinction is that the company in *Confectionery & Tobacco Drivers & Warehousemen's Union, Local 805 v. N.L.R.B., supra*, 312 F. 2d at 113, failed to avert to the reason for the discharge. The Record in this case will reveal that the Respondent made it clear at all relevant times that the dischargees were terminated for illegal activity.

The reliance by Petitioner on the use of the term "waiver" by the Second Circuit in the *Confectionery & Tobacco Driver's* case is not meaningful. The Second Circuit did not speak in terms of "waiver and rescission" as suggested by Petitioner, and did not elaborate on what it meant when it held that condonation "is more akin to the doctrine of waiver than to the technicalities of contract law." *Id.* at 113. Under the facts of that case, the court did not simply refer to a unilateral act on the part of the employer where there has been a prior discharge.

A conflict among circuits is thus not clear, and it is submitted a definitive determination by this Court is not required.

2. This case is not flatly contrary to National Labor Policy in an area of great significance.

Respondent has reformulated the questions presented, because Petitioner misperceives the issues involved. This is not a case involving unlawful preconditions to employment; "this is not what the complaint alleges nor how the case was tried." (A. 39). There is a clear distinction between reinstatement and reemployment. *See N.L.R.B. v. Textile Machine Works, Inc.*, 214 F. 2d 929, 932-934 (3d Cir. 1954); *N. L. R. B. v. Childs Co.*, 195 F. 2d 617, 619-621 (2d Cir. 1952); *N. L. R. B. v. Pennwoven, Inc.*, 194 F. 2d 521, 525-526 (3d Cir. 1952).

> "A discharged employee who seeks to be reinstated is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer. The word *reinstatement* must be employed in this connection as the equivalent of uninterrupted employment." *N. L. R. B. v. Textile Machine Works, Inc., supra*, 214 F. 2d at 932.

The dearth of cases in which there was a claim of condonation in a post-discharge setting is evidence of the general insignificance of the real issue decided by the Eighth Circuit. This is not an issue of sufficient importance to justify a grant of the writ.

3. Picketing may not be construed as acceptance of an offer of employment.

There is a very real distinction between picketing by non-employees and striking by employees. Petitioner is correct when it states that participation in a strike is "protected *employee* activity." The Board may only issue orders of reinstatement of "employees." 29 U. S. C. § 160 (c). The term "employee" does not include an individual who has been lawfully terminated. 29 U. S. C. § 152 (3).

As Chief Judge Gibson, writing for the court, stated:

"[W]e think the Board's order is unrealistic as it exaggerates the significance of the discharged employees' picketing and the somewhat general and ambiguous statements of the Company's representatives. . . ." (A. 8).

This point raised by Petitioner again misperceives the issue in the case. In any event, it raises no issue significant enough to justify a grant of the writ.

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CONCLUSION

Respondent, The Colonial Press, Inc., respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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